

APPENDIX F

Applicable Laws, Treaties, Licenses and Permits

APPENDIX F: APPLICABLE LAWS, TREATIES, LICENSES AND PERMITS

Federal Laws, Treaties, Licenses and Permits

Pacific Salmon Treaty

The Pacific Salmon Treaty was established March 17, 1985 between Canada and the United States to establish a framework for managing salmon populations either originating from one country and intercepted by the other, or affecting the management or the biology of the populations of the other country. The principles of the Treaty are to “1) prevent overfishing and to provide for optimum production, and 2) provide for each part to receive Benefits equivalent to the production of salmon originating in its waters.” Fisheries are managed according to terms specified in the annexes to the Treaty to meet international conservation and allocation objectives agreed to by the two countries. In developing these objectives, the Treaty requires the two countries to take into account 1) ways to reduce interceptions; 2) avoiding, in most cases, the undue disruption of existing fisheries; and, 3) the annual variability in the abundances of the populations.

The Treaty called for the establishment of the Pacific Salmon Commission, comprised of representatives of both countries, which oversees implementation of the Treaty. The Pacific Salmon Commission does not regulate salmon fisheries, but provides regulatory and technical advice to the two countries. Regulation of the fisheries is the responsibility of the two countries.

Most relevant to this Environmental Assessment is the June 30, 1999, Agreement (Annex 4), which stipulates management goals and measures for important chinook and coho populations that are taken in Southeast Alaska and Canada and off the U.S. Pacific Coast. Included among these populations are several listed chinook Evolutionarily Significant Units. The new agreement establishes an abundance-based chinook management regime for the populations and fisheries subject to the Pacific Salmon Treaty. This regime will be in effect from 1999 through 2008.

Endangered Species Act

The Endangered Species Act of 1973, as amended, 16 U.S.C 1531 *et seq.* (ESA) provides broad protection for fish, wildlife, and plant species that are listed as threatened or endangered, and the conservation of the ecosystems on which they depend. Responsibility for implementing the ESA is shared by the U.S. Fish and Wildlife Service (USFWS)(for terrestrial and freshwater species) and NMFS (for most marine species and anadromous fish). The ESA provides for the conservation of species which have been so depleted in numbers that they are in danger of or threatened with extinction

throughout all or a significant portion of their range. “Species” is defined the ESA as a species, a subspecies, or, or vertebrates only, a distinct population segment. NMFS has determined that a Pacific salmon stock will be considered a distinct population segment, and hence a “species” under the ESA, if it represents an evolutionarily significant unit (ESU) of the biological species.

Section 4 of the ESA prohibits the consideration of economic impacts in making species listing decisions. NMFS is required to make a listing decision based solely on the best scientific and commercial data available. However, under section 4, NMFS must consider economic impacts when designating critical habitat necessary for the continued survival of the species. After a species is listed, a recovery plan is prepared which identifies conservation measures to help the species recover.

Section 4(d) of the ESA requires the Secretary to adopt those regulations he deems necessary for the conservation of the species. The July 10, 2000 4(d) Rule for Puget Sound chinook under which the proposed action was provided to NMFS for consideration adopts those regulations necessary for the conservation of Puget Sound chinook. Fishing activities which are conducted in compliance with a resource management plans approved by NMFS are exempt from take prohibitions on listed Puget Sound chinook.

Section 7 of the ESA outlines the procedures for Federal interagency cooperation to conserve listed species and designated critical habitat, and requires all Federal agencies to consult with NMFS (or USFWS) concerning the potential effects of their actions on any listed species. Section 7(a)(1) requires federal agencies to conserve endangered and threatened species. Section 7(a)(2) requires federal agencies to ensure that any action authorized, funded, or carried out by such agencies is not likely to jeopardize endangered or threatened species, or result in the destruction or adverse modification of designated critical habitat. The determination that NMFS must make on the resource management plan constitutes a federal action and so requires consultation under section 7 of the Act.

If a proposed action is “likely to adversely affect” a listed species or its critical habitat, then formal consultation under section 7(a)(2) must be undertaken. Formal consultation concludes with NMFS’ issuing a biological opinion. If the biological opinion concludes that the proposed action is likely to “jeopardize” the continued existence of the listed species or result in the destruction or adverse modification of designated critical habitat, then NMFS may develop reasonable and prudent alternatives in order to avoid these outcomes.

U.S. v. Washington

Five treaties ratified by the United States and various Washington Tribes between 1854 and 1856 guaranteed Tribes fishing rights in common with citizens of the Territory. These are the treaties of Medicine Creek, Quinault, Neah Bay, Point Elliott, and Point-No-Point. Findings of United States v. Washington, see 384 F. Supp. 312, commonly referred to as the Boldt Decision (United States District Court for the Western District of Washington, Tacoma District 1974) clarified these treaties with regard to allocation of salmon harvests between Tribal and non-Tribal fishers, holding that Tribes are entitled to a 50 percent share of the harvestable run of fish. Hoh v. Baldrige, 522 F. Supp. 683 (United States District Court for the Western District of Washington, Tacoma District 1981), established the principle that where annual fishery management plans might affect an individual Tribe, the plans must take into account returns to individual streams, thus establishing a key management principle of river-by-river or run-by-run management. The Puget Sound Salmon Management Plan, and the framework management plan adopted under Hoh v. Baldrige established principles governing the management of shared salmon resources and established the principle of co-management whereby Tribes are equal co-managers with the State and represent themselves in the regional and international management forums.

In general, the court held the following:

- The State must seek to regulate Tribes by the least restrictive means consistent with necessary conservation measures.
- The Tribes must be afforded a fair opportunity to take their fair portion of fish from each run by reasonable means.
- The States may regulate accustomed Tribal fishing stations only where the interests of conservationⁱ are justified.

The Puget Sound treaty tribes co-manage Puget Sound fisheries with the state of Washington, and participate with tribes from California, Oregon and other Washington areas in managing fisheries under the jurisdiction of the Pacific Fisheries Management Council and the Pacific Salmon Treaty.

Executive Order ~~13084~~ 13175: Consultation and Coordination with Tribal Governments

This Executive Order was signed on ~~May 14, 1998~~ November 6, 2000, and published ~~May 19, 1998~~ November 9, 2000 (~~63-65~~ FR-27655, 67249). Its purpose is to establish regular and meaningful consultation and collaboration with Indian Tribal governments in the development of federal regulatory practices that significantly or uniquely affect their communities; to reduce the imposition on unfunded mandates on Indian Tribal governments; and to streamline the application process for and increase the

availability of waivers to Indian Tribal governments. This Executive Order requires federal agencies to have an effective process to involve and consult with representatives of Indian Tribal governments in developing regulatory policies and it prohibits regulations that impose substantial direct compliance costs on Indian Tribal communities.

Magnuson-Stevens Conservation and Management Act

The Magnuson-Stevens Act is the principal federal statute that provides for the management of U.S. marine fisheries. Originally enacted as the Fishery Conservation and Management Act in 1976 (Public Law 94-265), this law was arguably the most significant fisheries legislation in U.S. history. It has been amended periodically since 1976; most recently in 1996, by the Sustainable Fisheries Act (Public Law 104-297). The basic concepts of the Magnuson-Stevens Act have not changed and include the following:

- The biological conservation of a fishery resource has priority over its use.
- Conservation and management decision making must be based on the best available scientific information, which should include social, economic, and ecological factors along with biological factors.
- The needs of fishery resource users vary across the nation, and public participation in the policy making process should be maximized.

The Magnuson-Stevens Act (as amended in 1996) included the following policy statement regarding the nation's fisheries (16 U.S.C. 1801, Sec. 2[c]):

POLICY – It is further declared to be the policy of the Congress in this Act to:

- 1) Maintain without change the existing territorial or other ocean jurisdiction of the United States for all purposes other than the conservation and management of fishery resources, as provided for in this Act.
- 2) Authorize no impediment to, or interference with, recognized legitimate uses of the high seas, except as necessary for the conservation and management of fishery resources, as provided for in this Act.
- 3) Assure that the national fishery conservation and management program utilizes, and is based upon, the best scientific information available; involves, and is responsive to the needs of, interested and affected states and citizens; considers efficiency; draws upon federal, state, and academic capabilities in carrying out research, administration, management, and enforcement; considers the effects of fishing on immature fish and encourages development of practical

measures that minimize bycatch and avoid unnecessary waste of fish; and is workable and effective.

- 4) Permit foreign fishing consistent with the provisions of this Act.
- 5) Support and encourage active United States efforts to obtain internationally acceptable agreements which provide for effective conservation and management of fishery resources, and to secure agreements to regulate fishing by vessels or persons beyond the exclusive economic zones of any nation.
- 6) Foster and maintain the diversity of fisheries in the United States.
- 7) Ensure that the fishery resources adjacent to a Pacific Insular Area, including resident or migratory populations within the exclusive economic zone adjacent to such areas, be explored, developed, conserved, and managed for the benefit of the people of such area and of the United States.

The Magnuson-Stevens Act also established ten National Standards that serve as the overarching objectives for fishery conservation and management (16 U.S.C. 1851, Sec. 301[a].):

IN GENERAL – Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this title shall be consistent with the following national standards for fishery conservation and management:

- 1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.
- 2) Conservation and management measures shall be based upon the best scientific information available.
- 3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated populations of fish shall be managed as a unit or in close coordination.
- 4) Conservation and management measures shall not discriminate between residents of different states. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be a) fair and equitable to all such fishermen; b) reasonably calculated to promote conservation; and c) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

- 5) Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.
- 6) Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.
- 7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.
- 8) Conservation and management measures shall, consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished populations), take into account the importance of fishery resources to fishing communities in order to a) provide for the sustained participation of such communities, and b) to the extent practicable, minimize adverse economic impacts on such communities.
- 9) Conservation and management measures shall, to the extent practicable, a) minimize bycatch and b) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.
- 10) Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea.

The Magnuson-Stevens Act also mandates the Secretary of Commerce to develop advisory guidelines to assist in fishery management plan development. These guidelines serve primarily to interpret and aid compliance with the national standards (codified at 50 CFR Part 600, and most recently revised on May 1, 1998 [63 FR 24212]).

Marine Mammal Protection Act

The Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 *et seq.*), as amended through 1996, establishes a federal responsibility to conserve marine mammals; management responsibility for cetaceans (whales) and pinnipeds (seals) other than walrus is vested with NMFS. The U.S. Fish and Wildlife Service is responsible for all other marine mammals in Alaska including sea otter, walrus, and polar bear. Congress found that certain species and population populations of marine mammals are or may be in danger of extinction or depletion due to human activities. Congress also declared that marine mammals are resources of great international significance, and they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound resource management policies.

The Marine Mammal Protection Act's primary management objective is to maintain the health and stability of the marine ecosystem, with a goal of obtaining an optimum sustainable population of marine mammals within the carrying capacity of the habitat. The Marine Mammal Protection Act is intended to work in concert with the provisions of the ESA. The Secretary of Commerce is required to give full consideration to all factors regarding regulations applicable to the "take" of marine mammals, including the conservation, development, and use of fishery resources, and the economic and technological feasibility of implementing the regulations. If a fishery affects a marine mammal population, then the potential effects of the fishery must be analyzed in the appropriate Environmental Assessment or Environmental Impact Statement, and the managing jurisdiction or NMFS may be requested to consider regulations to mitigate adverse effects.

The Puget Sound salmon fisheries are considered Category II or Category III fisheries depending on gear type. Puget Sound non-treaty salmon drift gillnet fisheries are classified as Category II fisheries, primarily for their interactions with Harbor porpoises, Harbor seals and Dall's porpoise. A Category II rating indicates an occasional likelihood of serious injuries or mortalities to marine mammals, according to the annual list of fisheries published in the Federal Register (67 FR 2410). Washington salmon troll, beach seine, purse seine, reef net and charter boat fisheries are classified as Category III, indicating a remote likelihood of or no known serious injuries or mortalities to marine mammals. Participants in Category II fisheries register with state or federal permit systems and NMFS is tasked with developing take reduction plans for Category I and II fisheries.

National Environmental Policy Act (NEPA)

The National Environmental Policy Act became law on January 1, 1970. It was designed to ensure that federal agencies made decisions fully informed about the impacts of their actions on the human and natural environment, to reduce those impacts where possible and to promote research and understanding of the environment. This Environmental Assessment is intended to meet the National Environmental Policy Act requirements that apply to the proposed action.

Migratory Bird Treaty Act

The Migratory Bird Treaty Act of 1918 was designed to end the commercial trade of migratory birds and their feathers that, by the early years of the 20th century, had diminished populations of many native bird species. The Act states that it is unlawful to take, kill, or possess migratory birds and their parts (including eggs, nests, and feathers) and is a shared agreement between the United States, Canada, Japan, Mexico, and Russia to protect a common migratory bird resource. The Migratory Bird Treaty Act prohibits the directed take of seabirds, but the incidental take of seabirds does occur.

Executive Order 12898: Environmental Justice

This Executive Order was signed February 11, 1994 (59 FR 7630). It requires Federal agencies to identify and address “as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low income populations...”(section 1-101). The Executive Order specifically requires the inclusion of Native American communities in the analysis of these effects. The Executive Order directs federal agencies to develop agency-specific environmental justice strategies that identify the types of actions that may or have raised environmental justice issues and possible approaches to address such concerns, as appropriate (section 1-103). These strategies should:

- 1) Promote enforcement of health and environmental laws in these communities.
- 2) Improve research, data collection and data analysis of environmental and human health risks, particularly with regard to exposure of these communities to environmental hazards (section 3-3), whenever practicable and appropriate.
- 3) Assess subsistence consumption of fish, vegetation, or wildlife whenever practicable and appropriate (section 4-401).
- 4) Effective public participation and access to information so that all sectors of the community have the opportunity and information to participate in the NEPA process in a meaningful way to the extent feasible (section 5-5).

Fish and Wildlife Coordination Act

The Fish and Wildlife Coordination Act was signed March 10, 1934 and has been amended several times, the most recent of which was July 9, 1965. Its purpose is to provide assistance to, and cooperate with, federal, state, and public or private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat, in controlling losses of the same from disease or other causes, in minimizing damages from overabundant species, in

1. Providing public shooting and fishing areas, including easements across public lands for access thereto, and in carrying out other measures necessary to effectuate the purposes of said sections
2. Making surveys and investigations of the wildlife of the public domain, including lands and waters or interests therein acquired or controlled by any agency of the United States
3. Accepting donations of land and contributions of funds in furtherance of the purposes of said sections.

Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents within the Range of the Northern Spotted Owl, commonly referred to as the Northwest Forest Plan (NFP)

Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents within the Range of the Northern Spotted Owl is commonly referred to as the Northwest Forest Plan (NFP), adopted in 1994. The NFP is an integrated, comprehensive design for ecosystem management, inter-governmental and public collaboration, and rural community economic assistance for federal forests in western Oregon, Washington, and northern California. The management direction of the NFP consists of extensive standards and guidelines, including land allocations that comprise a comprehensive ecosystem management strategy. Aquatic conservation strategy objectives outlined in the NFP (Attachment A of the NFP) include, but are not limited to: “Maintain and restore the distribution, diversity, and complexity of watershed and landscape-scale features to ensure protection of the aquatic systems to which species, populations and communities are uniquely adapted;” and, “Maintain and restore water quality necessary to support healthy riparian, aquatic, and wetland ecosystems. Water quality must remain within the range that maintains the biological, physical, and chemical integrity of the system and benefits survival, growth, reproduction, and migration of individuals composing aquatic and riparian communities.”

Executive Order 12962: Recreational Fisheries

This Executive Order was signed June 7, 1995, and published June 9, 1995 (Volume 60, Number 111). Its purpose is to conserve, restore, and enhance aquatic systems to provide for increased recreational fishing opportunities nationwide. It states the following:

- Federal agencies, in cooperation with States and Tribes, are to improve the quantity, function, sustainable productivity, and distribution of U.S. aquatic resources for increased recreational fishing opportunities.
- A National Recreational Fisheries Coordination Council is to be established.
- A comprehensive Recreational Fishery Resources Conservation Plan is to be developed.
- All Federal agencies are to work to identify and minimize conflicts between recreational fisheries and their respective responsibilities under the ESA. The U.S. Fish and Wildlife Service and NMFS will develop a joint agency policy to ensure consistency in the administration of the ESA between and within the two agencies, promote collaboration with other federal, state, and tribal fisheries managers, and to improve and increase efforts to inform nonfederal entities of the requirements of the ESA.
- The role of the Sport Fishing and Boating Partnership Council is to be expanded.

Clean Water Act

The Federal Water Pollution Control Act was originally enacted in 1972 and amended with major provisions by legislation in 1977, 1981, and 1987. It is commonly referred to as the Clean Water Act. The principal objective of the Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. The Clean Water Act also establishes a national policy on technology-based effluent standards and discharge water quality standards.

Coastal Zone Management Act

The Coastal Zone Management Act (16 U.S.C. 1451 *et seq.*) is designed to encourage and assist states in developing coastal management programs, to coordinate state activities, and to safeguard regional and national interests in the coastal zone. Section 307(c) of the Coastal Zone Management Act requires that any federal activity affecting the land or water uses or natural resources of a state's coastal zone be consistent with the state's approved coastal management program, to the maximum extent practicable.

A proposed fishery management action that requires a fishery management plan amendment or implementing regulations must be assessed to determine whether it directly affects the coastal zone of a state with an approved coastal zone management program. If so, NMFS must provide the state agency having coastal zone management responsibility with a consistency determination for review at least 90 days before final NMFS action.

National Marine Sanctuaries Act

The National Marine Sanctuaries Act, as amended by the Oceans Act of 1992 (Public Law 102-587) and the National Marine Sanctuaries Preservation Act of 1996 (Public Law 104- 283), requires the government identify and designate those marine areas determined to be "of special national significance"(16 U.S.C. 1431 ET.SEQ. as amended by Public Law 104-283). Management plans are developed for each marine sanctuary in consultation with affected governments, tribes, and the public. The plans are to provide for the conservation and management of the sanctuaries and include provisions for research, public education and compatible resource use.

Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001

Section 515 directs the Office of Budget and Management to issue government-wide guidelines that "provide policy and procedural guidance to federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by federal agencies." The Office of Management and Budget in turn issued guidelines that required federal agencies to 1) develop their own guidelines; 2) provide a process for people to ask for and obtain

corrected information that is found not to comply with section 515 or agency guidelines; and 3) keep track of the complaints about the accuracy of information and how they were handled.

Executive Order 12630: Governmental Actions and Interference with Civil Constitutionally Protected Property Rights

This Act requires each Federal agency to prepare a “takings” implication assessment for any action that may affect the use of any real or personal property. Prohibiting specific types of fishing gear could be considered a “taking” under this Executive Order.

State Laws, Treaties, Licenses and Permits

State of Washington, Chapter 36.70A RCW Growth Management – Planning by Selected Counties and Cities

State of Washington, Chapter 36.70A RCW Growth Management – Planning by Selected Counties and Cities, commonly referred to as the Growth Management Act (GMA), was adopted by the State of Washington in 1990. Under GMA, growth projected for the State by the Office of Fiscal Management is allocated to counties, which then develop plans to address the projected population increases and associated needs for services. Cities of a certain size and/or growth rate are required to prepare comprehensive land use plans under the GMA to guide both zoning and development within the jurisdictional boundaries of the plans. GMA provides a framework for regional coordination. Counties planning under the GMA are required to adopt county-wide planning policies and to establish urban growth areas (UGAs). Local comprehensive plans must include the following elements: land use; housing; capital facilities; utilities; transportation; and, for counties, a rural element. Shoreline master program policies are also an element of local comprehensive plans. GMA establishes the primacy of the comprehensive plan. The comprehensive plan is the starting point for any planning process and the centerpiece of local planning. Development regulations must be consistent with comprehensive plans. State agencies are required to comply with comprehensive plans and development regulations of jurisdictions planning under GMA.

Washington State Shoreline Management Act of 1971 (SMA)

The SMA was adopted in Washington in 1972 with the goal of “prevent[ing] the inherent harm in an uncoordinated and piecemeal development of the state’s shorelines.” The provisions of this law are designed to guide the development of the shoreline lands in a manner that will promote and enhance the public interest. The law expresses the public concern for protection against adverse effects to public health, the land and its vegetation and wildlife, and the aquatic life of the waters.

Washington Forest Practices Act, Chapter 76.09 of the Revised Code of Washington (RCW)

Washington Forest Practices Act, Chapter 76.09 of the Revised Code of Washington (RCW), was adopted by the state of Washington in 1974. The Washington Forest Practices Board was established in 1975 by the Legislature under the State Forest Practices Act. By law, the board is charged with establishing rules to protect the State’s natural resources while maintaining a viable timber industry. Those rules, as embodied in the Washington Administrative Code (WAC), specifically consider the effects of various forest practices on fish, wildlife and water quality, as well as on capital improvements of the state or of its political subdivisions. A forest practice is defined as an activity carried out on forest land that relates to growing, harvesting or processing timber. Some examples include: logging, thinning, road construction, brush control, fertilization, and land conversions. Forest practice rules involving water quality protection must be approved by the Washington Department of Ecology.

Puget Sound Regional Council VISION 2020 Strategy

VISION 2020 is the long-range growth management, economic, and transportation strategy for the central Puget Sound region encompassing King, Kitsap, Pierce, and Snohomish counties. The strategy combines a public commitment to a growth management vision with the transportation investments and programs and economic strategy necessary to support that vision. VISION 2020 identifies the policies and key actions necessary to implement the overall strategy.

The vision is for “diverse, economically and environmentally healthy communities framed by open space and connected by a high-quality multimodal transportation system that provides effective mobility for people and goods.” The VISION 2020 strategy for managing growth, the economy, and transportation contains the following eight parts: urban growth areas; contiguous and orderly development; regional capital facilities; housing; rural areas; open space, resource protection, and critical areas; economics; and transportation. Together, these eight parts constitute the Multi-county Policies for King, Kitsap, Pierce, and Snohomish counties and meet the multi-county planning requirements of Washington’s Growth Management Act.

ⁱ In this context, conservation is defined as those measures that are reasonable and necessary to the perpetuation of a particular run or species of fish.